Supreme Court, U.S.
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No. 03-475

IN THE

Supreme Court of the United States

RICHARD B. CHENEY, VICE PRESIDENT
OF THE UNITED STATES, ET AL.,
Petitioners

v.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT JUDICIAL WATCH, INC.

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly denied Petitioners' request for mandamus relief and attempted interlocutory appeal concerning a non-appealable, non-final discovery ruling.

2. Whether this Court should adopt a construction of the Federal Advisory Committee Act that is at odds with the plain language of the statute and overturn the lower courts' efforts to postpone, if not avoid, addressing the constitutionality of the statute by authorizing narrow, carefully focused discovery.

3. Whether this Court should declare the Federal Advisory Committee Act unconstitutional as applied to the National Energy Policy Development Group.

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STATEMENT

This case comes before the Court on the denial of a motion for a protective order seeking to preclude all discovery. Rather than assert any objections or privileges in response to Respondents' discovery requests, Petitioners instead seek to immunize themselves from any discovery in this case by arguing that the district court's denial of their discovery motion provides a basis to challenge to the constitutionality of the Federal Advisory Committee Act ("FACA"). Following the long-standing precedent of this Court, the district court assiduously sought to postpone, if not avoid, consideration of any constitutional issue by authorizing "very tightly-reined" discovery. The court of appeals, which properly rejected Petitioners' request for mandamus relief and dismissed Petitioners' attempted interlocutory appeal of the district court's discovery order, carefully narrowed discovery even further to avoid reaching any constitutional issue. Nonetheless, Petitioners ask this Court to reject the lower courts' authorization of limited discovery as a means of constitutional avoidance and instead adopt a construction of FACA that is at odds with the plain language of the statute. In the alternative, they ask the Court to declare FACA unconstitutional based on a legal analysis that a majority of this Court has never adopted. The Court should decline Petitioners' invitation to prematurely and unnecessarily decide the constitutionality of FACA at this time solely on the lowers courts' well-considered, non-appealable discovery rulings. The ruling of the court of appeals should be affirmed, and this case should be remanded to the district court for discovery.

A. The National Energy Policy Development Group.

By memorandum dated January 29, 2001, President Bush established the National Energy Policy Development Group ("NEPDG") "to develop a national energy policy designed to help the private sector, and as necessary and appropriate, Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." J.A. 157. The President directed Vice President Richard B. Cheney to lead the group. J.A. 157. Various cabinet and other high-level Executive Branch officials were named as members. *Id.* Andrew Lundquist was made Executive Director. J.A. 143.

After several months of deliberations, on May 16, 2001, the NEPDG submitted a report and recommendations to the President. NEPDG, *National Energy Policy: Reliable, Affordable, and Environmentally Sound Energy for America's Future* at ii (2001). The NEPDG published its report and recommendations, with the approval of the President, on or about that same date. On June 28, 2001, President Bush transmitted the NEPDG's report and recommendations to Congress. 37 Weekly Comp. Pres. Doc. 988.

On June 25, 2001, Respondent Judicial Watch, Inc. ("Judicial Watch") sent a letter to Vice President Cheney, pursuant to the Freedom of Information Act ("FOIA") and FACA,[1] 5 U.S.C. § 552 and App. 1, *et seq.*, requesting copies

[1] FACA was enacted by Congress and signed by President Nixon in 1972 to ensure that "Congress and the public [are] kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees," among other purposes. 5 U.S.C. App. 2(b)(5).

of all minutes and final decision documents of NEPDG meetings, as well as a complete listing of all persons and entities that participated in NEPDG meetings. J.A. 30-31. Judicial Watch also asked to attend any future meetings of the NEPDG and requested contact information and a schedule for such meetings. J.A. 31. On July 5, 2001, Judicial Watch's request was denied. *Id.*

B. The Litigation Below.

On July 16, 2001, Judicial Watch filed suit in the U.S. District Court for the District of Columbia under both FOIA and FACA, among other applicable statutes. J.A. 1, 16-138. In its pleadings, Judicial Watch alleged, on information and belief, that private executives and lobbyists representing the energy industry "regularly attended and fully participated" in non-public meetings of the NEPDG "as if they were members" of the advisory committee.[2] J.A. 21. Judicial Watch's Complaint was based in large part on the decision of the U.S. Court of Appeals for the District of Columbia in *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993), which had held that persons may be considered members of an advisory committee if their "involvement and role are functionally indistinguishable from those of other members." In support of its allegations, Judicial Watch cited media reports of meetings between the Vice President, the NEPDG's

[2] Under FACA, the definition of an advisory committee includes both advisory groups and any subgroups. 5 U.S.C. App. 3(2). Judicial Watch's pleadings also reference both the NEPDG and subgroups of the NEPDG. J.A. 37-38. For the sake of convenience, in this brief Judicial Watch will refer to the NEPDG only, but that term should be read to include both the NEPDG and its subgroups.

Executive Director, Andrew Lundquist, and energy industry executives and lobbyists. J.A. 21-23. Judicial Watch also cited a letter from the Vice President's counsel, David S. Addington, to members of Congress admitting that NEPDG staff members "met with many individuals who were not federal employees" and a General Accounting Office report specifically finding that the NEPDG had met with "selected non-governmental parties" in its efforts to develop a proposed national energy policy.[3] J.A. 23, 27.

Having been denied access to the information it requested, Judicial Watch's Complaint sought, *inter alia*, a judgment

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[3] In a recent book, former Treasury Secretary Paul O'Neill, a member of the NEPDG, described the task force as consisting of "only government employees" because Vice President Cheney wanted to avoid the disclosure requirements of FACA. However, O'Neill also confirmed the significant involvement of non-federal employees in the NEPDG:

> Not that other voices didn't join in the conversation. Industry representatives -- in bureaucratic language, the "nonfederal stakeholders" -- were just outside the door. Before and after the formal task force meetings, principals and staff, often moving in small, interdepartmental groups, would meet with lobbyists from all the major energy concerns. For the most part, environmentalists were nowhere to be seen.

O'Neill further described Energy Secretary and NEPDG member Spencer Abraham meeting with "corporations and trade groups . . . each of which delivered policy recommendations and detailed reports." According to O'Neill, Vice President Cheney "met with Enron chairman Kenneth Lay" and received "detailed policy recommendations" from two industry groups. O'Neill also identified Interior Secretary Gail Norton and Environmental Protection Agency Administrator Christie Todd Whitman, both of whom were NEPDG members, as having met with industry executives. Ron Suskind, *The Price of Loyalty* 146 (2004).

declaring Defendants to be in violation of FACA, a writ of mandamus ordering Defendants to comply with FACA, and an injunction requiring release of "detailed minutes of each meeting of Defendant NEPDG . . . that contain a record of persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by Defendant NEPDG." J.A. 39. On January 25, 2002, Respondent Sierra Club filed a similar lawsuit in the U.S. District Court for the Northern District of California. The Sierra Club's lawsuit subsequently was transferred to the U.S. District Court for the District of Columbia and consolidated with Judicial Watch's lawsuit.

Petitioners moved to dismiss Respondents' claims, arguing that "application of FACA to the NEPDG's operations would directly interfere with the President's express constitutional authority" and that "such an expansive reading of FACA would encroach upon the President's constitutionally protected interest in receiving confidential advice from his chosen advisers, an interest that is also rooted in the principle of separation of powers." Pet. App. 4a-5a.

On July 11, 2002, the district court granted in part and denied in part Petitioners' motion to dismiss. Pet. App. 53a-123a. It granted the motion with respect to claims Respondents had asserted against the NEPDG and the Vice President under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, finding that neither the NEPDG nor the Vice President were "agencies" within the meaning of the APA. Pet. App. 77a-79a; 122a-23a. It denied the motion with respect to Respondents' mandamus claim, finding that FACA "leaves no room for discretion" with respect to an advisory committee's obligation to make its records available

for public inspection. Pet. App. 94a-95a. The district court also appropriately deferred any ruling on Petitioners' separation of powers argument, explaining that, "after discovery, the government may prevail on summary judgment on statutory grounds without the need for this Court to address the constitutionality of applying FACA [to the Vice President]." *Id.* at 119a. The district court was fully cognizant that, "while discovery in this case may raise some constitutional issues, those issues of executive privilege will be much more limited in scope than the broad constitutional challenge raised by the government here." *Id.* The district court also ordered Respondents to submit a joint, proposed discovery plan. *Id.* at 123a.

On August 2, 2002, the district court approved a discovery plan submitted by Respondents and ordered Petitioners to "file detailed and precise objections to particular requests" or "identify and explain their invocations of privilege with particularity." Pet. App. 5a. That same day, Respondents served a single set of interrogatories and a single set of document requests, consisting of nine interrogatories and eight document requests each, on Petitioners. J.A. 215-30. Importantly, Respondents' discovery requests were not directed to the President. *Id.* Nor were they directed to the Vice President individually. *Id.* Rather, Respondents' discovery requests were directed to Petitioners as a whole, including all members of the NEPDG and Executive Director Lundquist. *Id.*

In response, Petitioners declined to serve particularized objections or assert any claims of privilege. Instead, they filed a motion for a protective order and a motion for reconsideration of the district court's August 2, 2002 order

approving Respondents' discovery plan. They also submitted an affidavit by a member of the Vice President's staff, Ms. Karen Knutson, and "urged" the district court to consider, but did not file, a motion for summary judgment. *See* Pet. Br. 6; J.A. 235-41. Ms. Knutson's affidavit asserted that, "[t]o the best of my knowledge . . . no one other than [federal officers and employees] attended any of the [NEPDG] meetings." J.A. 240. Ms. Knutson also claimed to have been present at most of the meetings of the NEPDG, but not at meetings of subgroups of the NEPDG. J.A. 238-39.

On October 17, 2002, the district court denied Petitioners' motion for a protective order and for reconsideration. The district court also directed Petitioners to "produce non-privileged documents and a privilege log" by November 5, 2002. Pet. App. 6a. At a hearing that same day, the district court offered to review allegedly privileged materials *in camera* or appoint a special master to review any privilege claims. J.A. 247.

Instead of responding to the discovery requests and filing a privilege log (or even taking up the district court on its offer to review allegedly privileged information *in camera* or appoint a special master), on October 21, 2002, Petitioners requested a stay pending appeal, and, on October 23, 2002, filed a motion in the district court seeking certification of an interlocutory appeal under 28 U.S.C. § 1292(b). J.A. 368-82. The specific orders Petitioners sought to have certified for interlocutory appeal were as follows: (1) the district court's October 17, 2002 order denying Petitioners' motion for a protective order and for reconsideration of the district court's August 2, 2002 order approving Respondents' discovery plan; (2) the district court's September 9, 2002 order setting a

briefing schedule on discovery motions; and (3) the district court's July 11, 2002 ruling denying Petitioners' motion to dismiss. J.A. 279-81.

On November 7, 2002, while Petitioners' motion for certification of an interlocutory appeal was pending,[4] Vice President Cheney filed a notice of appeal from the following non-appealable, non-final orders entered by the district court: (1) the September 9, 2002 order setting a briefing schedule; (2) the October 17, 2002 order denying Petitioners' motion for a protective order and for reconsideration; and (3) a November 1, 2002 order entered by the district court denying Petitioners' motion for a stay pending appeal. J.A. 337-38.

On or about November 12, 2002, Petitioners filed an emergency motion for a writ of mandamus in the court of appeals challenging the district court's discovery orders. In their petition, Petitioners requested an order "vacat[ing] the discovery orders issued by the district court, direct[ing] the court to decide the case on the basis of the administrative record and such supplemental affidavits as it may require, and direct[ing] that the Vice President be dismissed as a defendant." J.A. 364-65.

The court of appeals properly rejected the petition for a writ of mandamus and granted Respondents' motion to dismiss the Vice President's appeal. In so ruling, the court of appeals found that Petitioners failed to satisfy the "heavy burden" required to justify the extraordinary remedy of mandamus. Pet. App. 19a. The panel majority unsurprisingly

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[4] The district court denied Petitioners' motion for certification of an interlocutory appeal on November 26, 2002. J.A. 383-413.

concluded that the district court's legal rulings could be fully considered on appeal following a final judgment and that Petitioners' speculative claims of harm could be fully prevented in the district court through "narrow, carefully focused discovery." *Id.* The court of appeals further held:

> Either the Vice President will have no need to claim privilege, or, if he does, then the district court's express willingness to entertain privilege claims and to review allegedly privileged documents in camera will prevent any harm. Moreover, such measures will enable the district court to resolve the statutory question -- whether FACA applies to the NEPDG -- without "sweeping intrusions into the Presidency and Vice Presidency." And, if after limited discovery, it turns out that no non-federal personnel participated as de facto NEPDG members, the district court will never have to face the serious constitutional issue lurking in this case -- whether FACA can be constitutionally applied to the President and Vice President.

Id. (citation omitted). In dismissing the Vice President's appeal, the court of appeals concluded that the collateral order doctrine did not apply, nor did *United States v. Nixon*, 418 U.S. 683 (1974) ("*Nixon I*"), the only authority relied on by the Vice President:

> Because the Vice President has yet to invoke executive privilege, we are not confronted with the "unseemly" prospect of forcing him to choose between either (1) disclosing allegedly privileged information and appealing following final judgment

> after the "cat is out of the bag," or (2) refusing to disclose and going into criminal contempt in order to create an appealable order. Absent this constitutionally troubling choice, *Nixon* is inapplicable.

Id. 24a-25a.

On September 10, 2003, the court of appeals denied a petition for rehearing filed by Petitioners, and, on December 15, 2003, this Court granted certiorari.

SUMMARY OF ARGUMENT

The courts below properly authorized limited discovery in order to postpone, if not avoid, significant constitutional issues. Petitioners refused to comply with the discovery ordered below, asserting an unprecedented claim to immunity from even having to invoke executive privilege in response to an entirely proper discovery request. Petitioners' subsequent request to the court of appeals for mandamus relief and the interlocutory appeal by the Vice President were properly rejected. Having ignored critical procedural and jurisdictional requirements, Petitioners now request that the Court either (1) interpret FACA in such narrow way that it would be virtually meaningless, or (2) find FACA unconstitutional as applied to Presidential advisory committees. The Court, however, need not even reach these issues, as the decisions below were entirely proper.

(a) The lower courts authorized "very tightly-reined" discovery in order to avoid, or at least postpone, consideration of significant constitutional issues. The district court correctly reasoned that narrowly focused discovery into a key

factual issue -- whether outside private, non-governmental parties participated in the NEPDG, and, if so, to what extent -- might obviate the need for consideration of Petitioners' separation of powers claim. The "very tightly-reined" discovery ordered by the district court was fully consistent with binding circuit precedent, *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), and subsequently was affirmed -- and narrowed further -- by the court of appeals. Contrary to Petitioners' exaggerated claims, the discovery is neither intrusive nor burdensome on the Executive Branch.

In addition, Petitioners' argument -- seeking to immunize the Executive Branch from any discovery without even having to raise particularized objections or assert privileges -- is unprecedented. The court of appeals properly rejected this startling bid for effective immunity from judicial process, noting that Petitioners have not suffered any cognizable harm and that a final order has not been entered. Moreover, and unlike in *United States v. Nixon*, 418 U.S. 683 (1974), no significant likelihood exists that the Vice President will be held in contempt. In short, Petitioners offer no sufficient reason why normal rules of discovery and justiciability are not applicable in this case.

(b) Petitioners' interpretation of FACA, that an advisory committee exists only as "established," is inconsistent with the plain language of the statute and would render FACA meaningless. FACA includes committees either "established" *or* "utilized" by the President. Petitioners' highly restrictive interpretation of FACA, under which a committee could consist only of those members formally designated when the committee was established, would ignore the operational

reality of a committee and eviscerate the purpose of the statute. If private, non-governmental parties participate in a committee after the committee is established, and the committee is subsequently "utilized" by the President, then it is clearly within the ambit of the statute. Petitioners' argument is not only inconsistent with the plain language of the statute, but it would make any violation of FACA unreviewable.

(c) Like their argument regarding discovery, Petitioners' argument regarding the constitutionality of FACA is unprecedented. No majority opinion of this Court has ever adopted the "bright-line" test advocated by Petitioners. Rather, for more than thirty years, the Court has applied a balancing test to separation of powers issues. The powers under the Recommendations and Opinion Clauses are not exclusive, core powers of the Executive Branch, and nothing in FACA prevents the President from exercising any of his constitutionally assigned functions. Any purported intrusion by FACA on Presidential power is *de minimis*, and is more than outweighed by the important objectives of the statute. In any event, the Court need not reach this constitutional issue.

ARGUMENT

I. Following Long-Standing Doctrine, The Lower Courts Properly Authorized Narrow, Carefully Focused Discovery.

In order to postpone, if not avoid, consideration of FACA's constitutionality, the district court ordered very limited discovery rather than adopt a construction of FACA that not only would be at odds with the plain meaning of the

statute, but also contrary to binding circuit court precedent. Petitioners nonetheless challenged the district court's discovery ruling by filing a petition for writ of mandamus and taking an interlocutory appeal. The court of appeals properly rejected Petitioners' petition for writ of mandamus and attempted interlocutory appeal and narrowed discovery even further, again as a means of constitutional avoidance.

Not satisfied with this result, Petitioners urge this Court to adopt a construction of FACA that is at odds with the plain meaning of the statute or, alternatively, to declare FACA unconstitutional entirely. In a futile attempt to infuse the appearance of validity into their unprecedented arguments, they also raise a host of arguments not directly related to the relief they seek. They argue, for instance, that a "presumption of regularity" prevents Respondents from challenging the operations of the NEPDG, that mandamus relief is not available to Respondents, and that the parties and the courts should be limited to considering the administrative record in reviewing Respondents' claims. These ancillary arguments are unavailing to Petitioners, as they lack merit individually and collectively.

A. The Lower Courts Properly Sought To Postpone, If Not Avoid, Consideration Of Any Constitutional Issues By Authorizing Very Limited Discovery.

Before authorizing any discovery, the district court applied ordinary rules of notice pleading and standard rules of procedure, as well as binding circuit precedent, in allowing Respondents' claims to proceed. There is no "heightened" pleading standard for FACA claims under the Federal Rules

of Civil Procedure, nor would the application of any such "heightened"pleading standard have been appropriate. Fed.R.Civ.P. 8(a); *see Crawford-El v. Britton*, 523 U.S. 574 (1998); *Leatherman v. Tarrant County*, 507 U.S. 163 (1993). Because Judicial Watch alleged that non-federal employees "regularly attended and fully participated" in non-public meetings of the NEPDG "as if they were members of the advisory committee" (J.A. 21), the district court was required to treat those well-pled allegations as if they were true. *Conley v. Gibson*, 355 U.S. 41, 48 (1957). It also was required to draw all reasonable inferences in favor of Judicial Watch. *Id.* Under *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993) ("*AAPS*"), Judicial Watch's allegations plainly stated a claim for relief.

Relying on the well-established doctrine of constitutional avoidance, the district court declined to address Petitioners' constitutional claim, *i.e.*, that FACA is unconstitutional as applied to the NEPDG. Pet. App. 98a-99a; *Spector Motor Service v. McLaughlin*, 323 U.S. 101,105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam) (constitutional avoidance especially applicable when relative authority of Congress and the Executive Branch are at issue). The district court explained that, in order to avoid the constitutional issues, it was ordering "very tightly-reined discovery" for three reasons.

First, after discovery, according to the district court, Petitioners may "prevail on summary judgment on statutory grounds after proving that no private individuals participated as members of the advisory committees at issue." Pet. App. 100a. Such a finding, of course, would render Petitioners' constitutional claim moot. Second, the district court stated that, if it were required to apply a constitutional balancing test under this Court's precedent, *e.g.*, *Nixon I* and *Morrison v. Olson*, 487 U.S. 654 (1988), it would require additional facts regarding the NEPDG -- *e.g.*, who participated in the NEPDG and to what extent -- in order to assess any intrusion on Executive power. Pet. App. 115a. The district court also reasoned that, if the NEPDG's subgroups in particular were far removed from the President, then any constitutional concerns would be diminished. *Id.* Third, any constitutional issue resulting from a particular discovery request and the subsequent assertion of executive privilege would be, according to the district court, much less "broad" than the Petitioners' overall constitutional challenge to the application of FACA to the NEPDG. Pet. App. 118a-119a. By ordering discovery on narrow factual issues, the district court properly pursued the course of action that best minimized consideration of constitutional issues. *Spector Motor Service*, 323 U.S. at 105; *American Foreign Serv. Ass'n*, 490 U.S. at 161.

In authorizing limited discovery to postpone, if not avoid, consideration of a significant constitutional question, the district court also appropriately relied on *AAPS*, which concerned a similar question of whether outside consultants "may still be properly described as member[s] of an advisory committee if [their] involvement and role are functionally indistinguishable from those of the other members." Pet.

App. 12a. To resolve this factual question, the court of appeals in *AAPS* held that limited discovery was appropriate. *AAPS*, 997 F.2d at 916. Counseled by *AAPS* and the doctrine of constitutional avoidance, the district court authorized "very tightly-reined" discovery consisting of a mere nine interrogatories and eight document requests.

The court of appeals affirmed the district court's discovery order, but narrowed discovery even further, declaring:

> [P]laintiffs have no need for the names of "all . . . persons" who participated in the Task Force's activities, nor "a description of [each] person's role in the activities of the Task Force." *They must discover only whether non-federal officials participated, and if so, to what extent.* Nor do plaintiffs require "all documents identifying or referring to any staff, personnel, contractors, consultants or employees of the Task Force." Rather *they need only documents referring to the involvement of non-federal officials* . . . [W]e are confident that the district court, whose pending discovery order invites petitioners to file "objections," will, consistent with the judiciary's responsibility to police the separation of powers in litigation involving the executive, respond to petitioners' concern and narrow the discovery to ensure plaintiffs obtain no more than they need to prove their case.

Pet. App. 17a-18a (emphasis added). In their efforts to effectively rewrite FACA, if not have the statute declared unconstitutional as applied to the NEPDG in order to

immunize themselves from discovery, Petitioners make no reference to the court of appeals' additional limitations on the scope of discovery.

In addition, and contrary to Petitioners' exaggerated and overstated claims, the district court's discovery order, as further narrowed by the court of appeals, is far from being the equivalent of the relief to which Respondents would be entitled if they ultimately were to prevail under FACA. As described above, the discovery ordered below is limited to establishing "*whether non-federal officials participated in [the NEPDG], and if so, to what extent.*" Pet. App. 17a (emphasis added). In sharp contrast, the relief available under FACA includes, but is not limited to, access to a far larger body of information and documentation, including all "*records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda or other documents which were made available to or prepared for or by each advisory committee . . . .*" 5 U.S.C. App. 2(10)(b) (emphasis added). The discovery ordered below -- especially after the court of appeals' further limitations -- clearly is far narrower than the broad array of records that would have to be made available to Respondents should they ultimately prevail on the merits.

Petitioners assert that the very limited discovery authorized by the lower courts creates "extreme interference" with the Executive Branch and a "general warrant to search" anywhere for evidence of de facto committee members. Pet. Br. 28, 35. They claim that "a President should not be forced to conduct an extensive -- and distracting -- line by line review of materials" and "assert privilege claims" in response to a discovery request. Pet. Br. 42. Petitioners' hyperbole notwithstanding, no "extreme interference" of any kind has

been ordered by the lower courts, nor will the President be required to undertake a line-by-line review of responsive documents and information. Not taking into account the additional limitations set forth by the court of appeals, Respondents' discovery requests consist of only nine interrogatories and eight document requests. J.A. 215, 224. They address discrete factual issues -- whether and to what extent private parties participated in the NEPDG and its subgroups. Moreover, Respondents' discovery requests were not directed to the President or the Vice President individually, but, rather, to Petitioners as a group. Even Petitioners have conceded that the allegedly "distracting" review necessary to comply with the district court's order (again, before it was narrowed further by the court of appeals), involves nothing more than the review of twelve boxes of documents by eight Justice Department attorneys, preparation of a privilege log, and assertion of any objections to the disclosure of particular documents. J.A. 283.

Petitioners' claims of "extreme interference" also are exaggerated, entirely speculative, and without foundation, as Petitioners have not raised any specific objections to any discovery request or made any assertions of privilege. Thus far, the district court merely ordered Petitioners to "file detailed and precise objections to particular requests" or "identify and explain their invocations of privilege with particularity" (Pet. App. 5a) and, when Petitioners refused to do so, to "produce non-privileged documents and a privilege log" by a date certain. Pet. App. 6a. Petitioners also have been offered, but thus far stubbornly declined, the opportunity to have any allegedly privileged materials reviewed *in camera* by the district court or by a special master. J.A. 247.

Nor do the lower courts' discovery orders raise constitutional concerns themselves. It is well-settled that officials of the Executive Branch do not have absolute immunity from suit or discovery. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982) ("Suits against other officials -- including Presidential aides -- generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself"). This Court has consistently held that even the President, from whom Respondents have not sought discovery, is not "above the law" and is subject to judicial process. *Nixon I*, 418 U.S. at 707 ("neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances"); *Clinton v. Jones*, 520 U.S. 681, 697 (1997). As this Court has explained, it is not correct to

> presum[e] that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions. "Our . . . system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" *Mistretta*, 488 U.S. at 381 (quoting *Buckley*, 424 U.S. at 121). As Madison explained, separation of powers does not mean that the branches "ought to have no partial agency in, or no control over the acts of each other."

Clinton, 520 U.S. at 702-03.

Far from being "unprecedented," as Petitioners claim (Pet. Br. 39-40), the discovery ordered by the lower courts is nothing more than an ordinary example of the routine interaction between branches of government. *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 425, 451-52 (1977) ("*Nixon II*") ("mere screening of [Executive] materials" for purposes of privilege assertion "constitutes a very limited intrusion" and does not violate separation of powers). District courts routinely manage cases involving discovery of Executive Branch officials without unduly infringing on the Executive Branch's functioning. *See, e.g., AAPS*, 997 F.2d at 915-16 (discovery ordered to determine documents to which plaintiffs would be entitled under de facto member theory); *Natural Resources Def. Council v. Curtis*, 189 F.R.D. 4 (D.D.C. 1999) (establishing discovery guidelines in FACA case); *Alexander v. FBI*, 194 F.R.D. 299 (D.D.C. 2000) (establishing discovery and privilege rules in response to document requests directed towards White House offices). This Court has expressly noted its "confidence in the ability of our federal judges" to manage such cases. *Clinton*, 520 U.S. at 709.

Finally, in seeking to avoid even the "very tightly-reined" and "narrow, carefully focused" discovery authorized by the lower courts, Petitioners attempt to secure the benefit of executive privilege without openly invoking its protection. In a typical case in which the Executive Branch seeks to prevent the release of confidential information, the President, or someone acting on his behalf, formally invokes executive privilege. *See In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997) ("The President can invoke the privilege when

asked to produce documents or other materials that reflect presidential decision making and deliberations and that the President believes should remain confidential."). If the President does not prevail, then he may seek an interlocutory appeal under the collateral order doctrine. That has not happened here, as neither the President nor anyone acting on his behalf has attempted to assert executive privilege. Instead, Petitioners, who are themselves defendants in this action, sought mandamus review and an interlocutory appeal of the district court's discovery order before there even was any attempt to assert a privilege. Petitioners are requesting, in essence, that the Court create special rules for cases involving discovery of the Vice President and other Executive Branch officials. Consistent with its prior rulings, the Court should decline this unprecedented request.

B. The Court Of Appeals Properly Rejected Petitioners' Request For Mandamus Relief And Dismissed The Vice President's Appeal.

In denying Petitioners' request for mandamus relief, the court of appeals correctly declared that Petitioners "are entitled to mandamus relief only if they face a risk of harm that cannot be cured in the district court." Pet. App. 12a. In so ruling, the court of appeals cited extensively to this Court's prior rulings in *Kerr v. United States District Court*, 426 U.S. 394, 401 (1976) ("[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations"), *Will v. United States*, 389 U.S. 90, 95 (1967) ("only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy") and *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36

(1980) ("[e]mphasizing the rarity of mandamus relief, the Supreme Court noted that 'our cases have answered the question as to the availability of mandamus . . . with the refrain: 'What never? Well, *hardly* ever!'"). Pet. App. 7a-8a. Ultimately, the court of appeals "follow[ed] closely in the Supreme Court's footsteps in *Kerr*," in which this Court denied a writ of mandamus seeking to challenge a discovery ruling because the lower court's ruling provided petitioners "an avenue far short of mandamus" to protect their interests. Pet. App. 18a -19a (quoting *Kerr*, 426 U.S. at 404-05). The court of appeals declared, "We are equally confident that the district court here will protect petitioners' legitimate interests and keep discovery within appropriate limits -- or as the district court itself put it, 'tightly reined discovery.'" Pet. App. 19a.

Petitioners do not cite, much less attempt to explain, how the court of appeals misapplied *Kerr* or this Court's other rulings governing mandamus. Denial of mandamus relief was entirely appropriate, because, as the court of appeals found:

> [P]etitioners' primary argument -- that the broad discovery plaintiffs seek will violate the separation of powers -- is premature. Petitioners have yet to invoke executive privilege, which is itself designed to protect the separation of powers . . ., and the narrow discovery we expect the district court to allow may avoid the need for petitioners even to invoke the privilege.

Pet. App. 22a-23a. Moreover, Petitioners "can point to no harm because [they have] yet to specify any privileged materials or otherwise cite objections for consideration by the

District Court." Pet. App. 27a (Edwards, J., concurring); *see also National Ass'n of Criminal Def. Lawyers, Inc. v. U.S. Dep't of Justice*, 182 F.3d 981, 986 (D.C. Cir. 1999). Rather than grant Petitioners the extraordinary relief of a writ of mandamus, the court of appeals properly directed Petitioners to avail themselves of the protections offered by the district court.

Petitioners' mandamus argument nonetheless relies heavily on this Court's ruling in *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). Pet. Br. 39-40. Petitioners claim that the court of appeals' refusal to grant them mandamus relief was somehow inconsistent with *Public Citizen*, but they ignore the fact that *Public Citizen* did not involve any issue of discovery, or even any claim that authorizing discovery of high-level Executive Branch officials implicated separation of powers concerns. High-level Executive Branch officials are not immune from discovery, as Judicial Watch has demonstrated. *See* Section II(A), *supra*. *Public Citizen* did not rule otherwise. That case also was before the Court on a final judgment, not on a discovery order. Petitioners simply try to read too much into *Public Citizen* in arguing that it supports their claim for mandamus relief.

Curiously, Petitioners also cite *United States v. Poindexter*, 727 F. Supp. 1501 (D.D.C. 1989) for the remarkable proposition that they should not even have to invoke executive privilege in order to be entitled to mandamus relief. Pet. Br. 42. *Poindexter* provides no solace to Petitioners, however, because, as the district court found,

it is "easily distinguishable" and "inapposite." J.A. 399.[5] In *Poindexter*, former President Ronald Reagan moved to quash a document subpoena served on him during the criminal prosecution of former National Security Advisor John Poindexter. *Poindexter*, 727 F. Supp. at 1503. President Reagan argued that the scope of the subpoena was unreasonable and oppressive. *Id.* His motion to quash also referenced, but did not invoke, executive privilege. *Id.* Following the long-established principle of constitutional avoidance, the *Poindexter* court narrowed the scope of the subpoena as a means of balancing the interests of the parties without prematurely requiring the court to resolve the constitutional questions raised by the subpoena. In this important respect, *Poindexter* is in complete harmony with the case *sub judice*, where the court of appeals properly narrowed Respondents' already limited discovery requests to Petitioners and cautioned the district court to keep a tight rein on discovery so as to avoid, if possible, any need to decide any constitutional questions concerning separation of powers. Equally important, *Poindexter* rejected the position advanced by Petitioners here, namely, that a party seeking discovery from the Executive Branch must show a heightened standard

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[5] The district court below reprimanded Petitioners for misstating the relevance of *Poindexter*:

> Once again, the defendants have misrepresented precedent in order to fit it within their theory that a party must make some showing of "need" before an Executive Branch defendant should be even required to review documents responsive to a Court-approved discovery request, and to determine if viable grounds for assertion of a privilege exists.

J.A. 400.

of need, in addition to relevance and materiality. *Poindexter*, 727 F. Supp. at 1505-07. Thus, far from supporting Petitioners' request for mandamus relief, *Poindexter* undermines the request.

Petitioners also claim that the Vice President is entitled to an immediate, interlocutory review of the district court's otherwise non-appealable discovery order pursuant to the provisions of 28 U.S.C. § 1291. "As a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review." *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992). Petitioners cite *Nixon I* for the proposition that the Vice President should be allowed to take an immediate, interlocutory review of the district court's discovery ruling, even though *Nixon I* involved review of an order entered *after* President Nixon had asserted executive privilege. *Nixon I*, thus, is readily distinguishable from the facts of this case because (1) *Nixon I* involved the President, not the Vice President; and (2) the President had invoked executive privilege in *Nixon I*, whereas there has been no assertion of privilege, much less an objection to the scope of discovery, in this case.

In addition, unlike in *Nixon I*, the Vice President is not faced with the "unseemly" prospect of being held in contempt of court, as Petitioners contend. Pet. Br. 43. The Vice President has had every opportunity to object to the scope of discovery, assert claims of privilege, or have responsive materials considered *in camera* by the district court or reviewed by a special master. He has declined to avail himself of any of these opportunities. In the event that the Vice President continues to refuse to participate in discovery, Respondents and the district court have all of the mechanisms

available under Rule 37 of the Federal Rules of Civil Procedure to review his conduct and compel his compliance, none of which necessarily include his being held in contempt. Fed.R.Civ.P. 37. This stands in marked contrast to *Nixon I*, in which a grand jury subpoena had been served on President Nixon and the only review mechanism and remedy available was contempt. Nor do Petitioners offer any rationale as to why the special protection afforded to presidents under *Nixon I* should be extended to vice presidents, or how far down into the Executive Branch this special protection should extend.

Finally, it is ironic that Petitioners argue *Nixon I* should be extended to the Vice President because "the President is in many respects the real party in interest." Pet. Br. 44. If Respondents' discovery requests were directed to the President -- and they clearly are not -- then the President could assert executive privilege or raise any other privileges or objections he might choose to make, and those privileges and objections most likely would be reviewable either under *Nixon I* or the collateral order doctrine. Far from demonstrating that *Nixon I* and the collateral order doctrine should be extended to the Vice President in this case, Petitioners' argument actually shows why they should not be extended.

C. Petitioners' Ancillary Arguments Regarding The Lower Courts' Rulings Lack Merit.

In attempting to immunize themselves from discovery, Petitioners also raise several ancillary arguments that are not directly related to their efforts to effectively rewrite FACA or

have the statute declared unconstitutional. These arguments lack merit individually and collectively.

First, Petitioners argued in the district court that the APA did not apply to either the NEPDG or the Vice President. The district court agreed and dismissed these claims. Pet. App. 77a-79a; 122a-23a. Nevertheless, Petitioners try to apply a principle of APA law -- that a "presumption of regularity" attaches to the actions of government agencies -- to Respondents' claims for mandamus relief. Petitioners' argument is unprecedented. They cite no authority for applying a "presumption of regularity" to a mandamus claim. In fact, Petitioners' chief authority, *United States v. Armstrong*, 534 U.S. 456 (1996), concerned the rejection of several criminal defendants' motion to dismiss an indictment on the grounds of selective prosecution. Clearly, *Armstrong* is readily distinguishable. There is no "presumption of regularity" as applied to mandamus actions. If such a presumption were created, it would represent a dramatic reduction in the ability of plaintiffs to remedy government misconduct, not only under FACA, but in any action against government officials. *See generally Clinton*, 520 U.S. at 705 (noting the judiciary's power to review the legality of even the President's official conduct); *Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.") .

Second, Petitioners try to resurrect their flawed argument rejected by the district court that Respondents' claims are not reviewable under mandamus. Pet. Br. 24-26. On the

contrary, the district court's conclusion was fully in keeping with the "general presumption of reviewability" when a federal statute is violated and no other cause of action is available. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996) (citing *Leedom v. Kyne*, 358 U.S. 184, 188 (1958)); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) (courts will "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.").

In addition, Respondents plainly alleged a right to the information they seek. *Leedom*, 358 U.S. at 188 ("a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given."). Judicial Watch requested, and was denied, access to "all minutes and final decision documents" and a listing of all parties that participated in the NEPDG, among other relief. J.A. 30-31. Judicial Watch seeks this information as a nonprofit corporation that "undertakes educational and other programs to promote and protect the public interest in matters of public concern." J.A. 17. Petitioners' refusal of Judicial Watch's request for information, and Petitioners' failure to abide by the provisions of FACA, represent a specific "deprivation of a right" to which Respondents are entitled to relief. Consequently, mandamus is available to secure Judicial Watch's request for access to the records of the NEPDG.

Third, Petitioners argue that discovery would be inappropriate if this were an APA case, which they contend it is not. Pet. Br. 26. Petitioners cite no authority, however, as to why Respondents are not entitled to the same discovery

rights in a mandamus case as they would be in any other civil action. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (The civil discovery rules are "available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant."). As Petitioners concede, moreover, discovery is appropriate even under the APA if a "gap" exists in the administrative record. Pet. Br. 27 n.4. In this case, no APA-type "administrative record" exists; there is only the President's initial memorandum and the NEPDG's final report. Even consideration of the self-serving Knutson affidavit, created during litigation and never part of the "record," would not fully resolve questions concerning whether and to what extent private, non-governmental parties may have participated in the NEPDG. *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 419 (1971) ("litigation affidavits" not part of the record); *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) (when administrative record is "so bare that it prevents effective judicial review," no presumption is justified). Accordingly, in the absence of an "administrative record," limited discovery, like that ordered below, is entirely appropriate.

II. The Lower Courts' Application of FACA Was Consistent With The Plain Language Of The Statute.

Although both the district court and the court of appeals properly authorized narrow, carefully focused discovery in order to postpone, if not avoid, reaching any constitutional issues, and although the appellate court properly applied ordinary principles of mandamus review and the law governing interlocutory appeals in affirming the district

court's discovery order, Petitioners nonetheless argue that this Court should review the lower courts' discovery rulings by considering the merits of Respondents' claims. They seek to transform review of the denial of their request for the extraordinary relief of mandamus and the dismissal of their unprecedented interlocutory appeal into an even more extraordinary review by this Court on the merits. Even if this Court were to consider Respondents' claims on the merits, it should reject Petitioners statutory construction argument.

The balance and disclosure requirements of FACA are implicated whenever an advisory committee not composed solely of "full time, or permanent part-time, officers or employees of the federal government" is "established *or* utilized" by the President. 5 U.S.C. App. 3(2)(B) (emphasis added). Judicial Watch recognizes, as Petitioners do, that, in enacting FACA, Congress foresaw regulation of the process by which the President and other Executive Branch officials obtain information in performing functions assigned to them by the Constitution might implicate important constitutional concerns. Judicial Watch also recognizes, as Petitioners do, that Congress sought to resolve these concerns by (1) exempting from FACA's reach all advisory committees composed solely of "full-time, or permanent part-time, officers or employees of the federal government" and (2) leaving it to the President or his subordinates to choose whether to establish *or* utilize an advisory committee that includes outside members and, thereby, is subject to FACA's balance and disclosure requirements. The issue raised by this lawsuit is whether FACA's disclosure requirements are triggered where an advisory committee consisting solely of full-time officers or employees of the federal government is "established" by the President, but, subsequently, the

committee is expanded to permit private, non-governmental parties to participate, and the President nonetheless "utilizes" the committee's work.

Petitioners argue that the Court should disregard the plain language of FACA by adopting an unduly restrictive definition of what it means for the President to have "established" an advisory committee. Petitioners' proposed statutory construction would effectively eviscerate FACA. More importantly, it also ignores FACA's applicability to advisory committees "utilized" by the President.

The starting point -- and the ordinary stopping point -- for analyzing the application of a statute to any set of facts is the plain language of the statute itself. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). "In a statutory construction case, the beginning point must be the language of the statute, and, when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart*, at 475.

The language of FACA is clear:

> The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . is
>
> (A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such terms excludes (i) any committee which is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration

5 U.S.C. App. 3(2).

Petitioners cannot, and do not, argue that the President did not "establish" the NEPDG. They even use the word "established" in their brief to describe the President's creation of the NEPDG:

> Less then ten days after taking office, President Bush *established* the [NEPDG] as an entity within the Executive Office of the President to advise the President in formulating energy policy.

Pet. Br. 3 (citing, J.A 156-59) (emphasis added).

Nor can they argue that the President did not "utilize" the NEPDG in the ordinary sense of the word. They admit as much:

> On May 16, 2001, the NEPDG submitted to the President, and with his approval, published its report containing recommendations to enhance energy supplies and encourage conservation . . . .
>
> On June 28, 2001, the President transmitted to Congress the NEPDG Report and, according to the accompanying message, its "proposals . . . that require legislative action. In his message, the President stated that "[o]ne of the first actions" he took as President "was to create the [NEPDG] to examine American's energy needs and to develop a policy to put our Nation's energy future on sound footing." He explained that the "legislative initiatives" included in the report would help address energy challenges with "enormous implications for our economy, our environment, and our national security."

Pet. Br. 4-5 (citation omitted). Based on the plain language of FACA, it is obvious that the President both established *and* utilized the NEPDG. The only true question, then, is a question of fact: whether the NEPDG, as established *or* utilized by the President, was "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government?" 5 U.S.C. App. 3(2).

Nonetheless, Petitioners argue that the lower courts should have construed FACA differently. They assert that an advisory committee is only "established" to the extent it is "specifically authorized by statute or by the President." Pet. Br. 18 (citing 5 U.S.C. App. 9(a)). Petitioners argue that, if the President did not "specifically authorize" an advisory

committee to include as members persons who were not full-time or permanent part-time federal officers or employees, then an advisory committee cannot have been "established" as such and FACA cannot apply.

Petitioners' argument only begs the question. The NEPDG was created and established by the President in a January 29, 2001 memorandum. J.A. 156-59. Whether the President, after establishing the NEPDG in his January 29, 2001 memorandum, directed the advisory committee's members to allow former Enron chief executive Kenneth Lay or other private, non-governmental parties to participate in the committee's meetings and deliberations logically does not call into question whether the NEPDG was established or specifically authorized by the President in the first instance. Similarly, whether members of the NEPDG regularly met with energy industry representatives as part of their meetings and deliberations does not negate the establishment of the committee, nor does it mean that the President did not specifically authorize the establishment of the committee in his January 29, 2001 memorandum. In either event, the President still utilized the results of the NEPDG's efforts when he published and approved the committee's recommendations and conveyed them to Congress.

In addition, nothing in Section 9 of FACA purports to limit or define the membership of an advisory committee. It is an administrative provision that describes how advisory committees are to be established, not who can be considered a member. The section requires advisory committees to be "specifically authorized by statute or by the President," or "determined as a matter of formal record, by the head of the agency involved after consultation with the Director

[Administrator] . . . to be in the public interest . . . ." 5 U.S.C. App. 9(a). It requires a charter to be filed with the Administrator of the General Services Administration ("GSA") or the agency head and standing committees of Congress having legislative jurisdiction over the agency. 5 U.S.C. App. 9(c). It specifies the contents of the charter, and, finally, requires that a copy of the charter be furnished to the Library of Congress. 5 U.S.C. App. 9(c). Petitioners try to use Section 9 for a purpose that is other than the purpose described by the plain meaning of its text.

Nor can Petitioners rely on regulations promulgated by GSA to bolster their statutory construction argument. The Court addressed these very same regulations in *Public Citizen* and found them unpersuasive. 491 U.S. at 456 n.12. This Court need not defer to GSA's interpretation of FACA because, among the other compelling reasons set forth in *Public Citizen*, the regulations at issue were not promulgated pursuant to any express statutory authority regarding FACA, and GSA has not been empowered to issue a regulatory definition of the term "advisory committee" that carries the force of law. *Id.*

Moreover, Petitioners' proposed construction of FACA would render violations of what otherwise are clear, indisputable, and non-discretionary legal duties effectively unreviewable. All a president or agency head would need to do to avoid the balance and disclosure requirements of FACA is declare that a committee be composed of full-time or permanent part-time federal officials or employees only, and the committee could not be subject to judicial review regardless of its operational reality. FACA could be violated with impunity merely by paying lip service to the composition

of the committee's membership. This cannot be a proper construction of the statute and cannot be considered to be consonant with the purpose of FACA. Such a construction would eviscerate FACA and defeat the important goals the statute was designed to achieve when it was enacted into law. *See, e.g.*, 5 U.S.C. App. 2.

Nor does Petitioners' extremely limited interpretation of what it means for an advisory committee to be "established" under FACA support the relief Petitioners ultimately seek. Petitioners' argument ignores FACA's inclusion of the word "utilized" in defining an advisory committee as any advisory group or subgroup "established *or* utilized by the President." 5 U.S.C. App. 3(2)(B) (emphasis added). The President may have "established" the NEPDG as an advisory committee composed solely of federal officials, even using Petitioners' very narrow definition of the word, but nonetheless may have "utilized" the NEPDG as composed, in fact, of both federal officials and private, non-governmental parties, as Respondents have alleged. Consequently, even if this Court were to adopt Petitioners' definition of "established" under FACA, Respondents' claims nevertheless would continue.

When confronted with this question of fact about the membership of the NEPDG, both the district court and the court of appeals looked to a prior ruling that answered the question in the only reasonable, logical, and convincing way possible. In *AAPS*, the court was confronted with the question of whether certain consultants who participated in the President's Task Force on National Health Care Reform were members of the advisory committee. The court held:

> The key issue, it seems to us, is not whether these consultants are "full time" government employees under section 3(2), but whether they can be considered members of the working group at all. When an advisory committee of wholly government officials brings in a "consultant" for a one-time meeting, FACA is not triggered because the consultant is not really a member of the advisory committee. . . . We are confident that Congress did not intend FACA to extend to episodic meetings between government officials and a consultant. To do so would achieve the absurd result *Public Citizen* warned against: reading FACA to cover every instance when the President (or an agency) informally seeks advice from two or more private citizens.
>
> But a consultant may still be properly described as a member of an advisory committee if his involvement and role are functionally indistinguishable from those of the other members. Whether they exercise any supervisory or decisionmaking authority is irrelevant. If a "consultant" regularly attends and fully participates in working groups as if he were a "member," he should be regarded as a member.

AAPS, 997 F.2d at 915. The appellate court did not see fit to question whether the President, in creating the Task Force on National Health Care Reform, "established" or "utilized" that advisory committee in the ordinary sense of those words. In fact, the result was so obvious that the government in *AAPS* did not even raise the issue. *Id.* at 903. The construction of FACA applied by both the district court and the court of appeals was entirely proper.

Moreover, applying the plain meaning of the words in FACA to the facts in this case does not mean the lower courts would have to undertake "standardless, amorphous, post-hoc review" of an advisory committee's membership. Establishing standards of review and applying those standards to a set of facts is exactly what courts do, and is what the appellate court actually did in *AAPS*.

Finally, is it not sufficient to ignore the plain meaning of FACA, as Petitioners urge the Court to do, on the purported basis of constitutional avoidance. In his concurrence in *Public Citizen*, Justice Kennedy specifically warned against adopting disingenuous interpretations of statutes in order to avoid constitutional questions:

> Although I agree that we should "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided," this principle cannot be stretched beyond the point at which such a construction remains "*fairly* possible." And it should not be given too broad a scope lest a whole new range of Government action be proscribed by interpretative shadows cast by constitutional provisions that might or might not invalidate it. The fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of a statute. If that were permissible, then the power of judicial review of legislation could be made unnecessary, for whenever the application of the statute would have potential inconsistency with the Constitution, we could merely opine that the statute did not cover the conduct in question because it would be discomforting or even absurd to think that Congress intended to act in an unconstitutional manner. The utter circularity of this approach explains why it has never been our rule.

Public Citizen, 491 U.S. at 481 (emphasis original) (citations omitted). The obvious solution is to follow the doctrine of constitutional avoidance down a different path: limited, narrowly focused discovery into "whether non-federal officials participated [in the NEPDG] and, if so, to what extent." Pet. App. 17a; *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring) (courts should only rule on constitutional issues as a last resort). This is exactly the course of action followed by both the district court and the court of appeals.

III. FACA Does Not Violate The Constitution As Applied To The NEPDG.

Although Judicial Watch respectfully submits that this Court's review of the lower courts' rulings should be limited to the court of appeals' denial of Petitioners' request for mandamus relief and dismissal of Petitioners' interlocutory appeal, in the event the Court reaches Petitioners' constitutional claims, it should apply long-standing precedent and uphold the constitutionality of FACA.

Any analysis of FACA begins, of course, with the "formulary caution" that great deference is owed to Congress' view that what it has done is constitutional and is entitled to a "presumption of constitutionality." *Morrison*, 487 U.S. at 704 (Scalia, J., dissenting) (citing *Rostker v. Goldberg*, 453 U.S. 47, 64 (1981); *Fullilove v. Klutznick*, 448 U.S. 472

(1980) (opinion of Burger, C.J.); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 91, 102-03 (1973); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963)). Petitioners do not even attempt to rebut the "presumption of constitutionality" in their argument.

Instead, Petitioners ask the Court to apply a "bright-line" test to separation of powers issues by which any statute touching on the President's exclusive, enumerated powers would necessarily violate the balance struck by the constitution. Pet. Br. 28-34. They argue that the powers contained in the Recommendations and Opinion Clauses of the U.S. Constitution are exclusive, enumerated, Presidential powers and, consequently, "are not subject to manipulation or interference by Congress."[6] *Id.* No majority of this Court has ever endorsed such a "bright-line" test. *Cf. Morrison*, 487 U.S. at 711 (Scalia, J., dissenting) (noting "balancing test" adopted by majority); *Public Citizen*, 491 U.S. at 484-87 (Kennedy, J., Rehnquist, C.J., and O'Connor, J., concurring) (noting "balancing test"). In fact, Petitioners' argument ignores more than thirty years of precedent applying a balancing test to separation of powers issues.

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson recognized that the three branches of government do not function completely apart, but instead are

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[6] The Opinion Clause states, "The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to their respective Offices." U.S. Const. art. II, § 2. The Recommendations Clause states, "He shall . . . recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3.

intended to complement each other. Justice Jackson observed:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispensed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress . . . .

Youngstown, 343 U.S. at 635.

In *Nixon I*, the Court further elaborated on the separation of powers principles enunciated by Justice Jackson in *Youngstown Sheet & Tube Co.* The Court in *Nixon I* unanimously held that President Nixon did not possess absolute immunity from judicial process after he made generalized assertions of executive privilege in response to a grand jury subpoena. The President argued that the need to protect communications between high government officials and the independence of the Executive Branch within its own sphere precluded enforcement of the grand jury subpoena. The Court soundly rejected President Nixon's claims:

> However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an

absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

Nixon I, 418 U.S. at 706. In balancing the President's "generalized interest in confidentiality" against the "fundamental demands of due process of laws in the fair administration of justice," the Court determined that the President's generalized interest had to yield. *Id.* at 713.

In *Nixon II*, the Court again applied a balancing test in upholding the constitutionality of the Presidential Recordings and Materials Preservation Act ("the Act"). The Act directed the Administrator of General Services to take custody of Presidential papers and tape recordings, among other materials belonging to former President Nixon, and to promulgate regulations governing public access to the materials. The Court flatly rejected President Nixon's argument that the Act's "regulation of the disposition of Presidential materials within the Executive Branch, without

more, violated the principle of separation of powers." *Nixon II*, 433 U.S. at 441. In so ruling, the Court noted that it had adopted a "more pragmatic, flexible approach" to separation of powers in *Nixon I* and "essentially embraced" Justice Jackson's view in his concurrence in *Youngstown Sheet & Tube Co. Id.* at 442-43. It expressly rejected what it called an "archaic view of the separation of powers as requiring three airtight departments of government." *Id.* at 443. Citing *Nixon I*, the Court continued:

> Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether the impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Id. (citing *Nixon I*, 418 U.S. at 711-12).

Importantly, the Court in *Nixon II* also cited a significant history of statutory regulation of Executive Branch materials in reaching its conclusion that the Act was not unduly disruptive of the Executive Branch:

> And, of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. Such regulation of materials generated in the Executive Branch has never been considered invalid as an invasion of its autonomy. Similar congressional

> power to regulate Executive Branch documents exists in this instance, a power that is augmented by the important interests that the Act seeks to attain.

Nixon II, 433 U.S. at 445 (citing FOIA, 5 U.S.C. § 552; the Privacy Act of 1974, 5 U.S.C. § 552a; the Government in the Sunshine Act, 5 U.S.C. § 552b; the Federal Records Act, 44 U.S.C. § 2101, *et seq.*; and a variety of other statutes, *e.g.*, 13 U.S.C. §§ 8-9 (census data); 26 U.S.C. § 6103 (tax returns)).[7]

The Court applied a balancing test again in *Morrison*, a case involving a legal challenge to the constitutionality of the Ethics in Government Act of 1978. *Morrison*, 487 U.S. at 693-94; *id.* at 711 (Scalia, J., dissenting) (noting "balancing test" adopted by majority). The independent counsel law, it was contended, impermissibly undermined the Executive Branch's ability to accomplish its constitutionally assigned duty to "take care that the laws be faithfully executed" by limiting its ability to supervise and control the investigation and prosecution of criminal activity by high-ranking government officials. The Court, citing *Youngstown Sheet & Tube Co.*, *Nixon I*, and *Nixon II*, held that the independent counsel law did not violate separation of powers principles because the Executive Branch retained "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* at 694-96. The Court also found it significant that the

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[7] The Court in *Nixon II* also noted that the Executive Branch "became a party to the Act's regulation" when it was signed into law by President Ford. 433 U.S. at 441. Conspicuously absent from Petitioners' argument is any recognition of the fact that the Executive Branch similarly became a party to FACA's regulatory scheme when it was signed into law, ironically by President Nixon.

independent counsel law was not an attempt by Congress to increase its own powers at the expense of the Executive Branch. *Id.* at 694.

In light of this long-standing precedent, the Court should apply the balancing test of *Youngstown Sheet & Tube Co.*, *Nixon I*, *Nixon II*, and *Morrison* in considering Petitioners' constitutional challenge to FACA. It should reject Petitioners' extraordinary and unprecedented request for a "bright-line" test.

Applying this balancing test to FACA, it is clear that the statute is fully consonant with the separation of powers doctrine. The powers contained within the Recommendations Clause and the Opinion Clause are not exclusive powers of the President, unlike the "pardon" power (*United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), the "prosecutorial" power (*Morrison*), the "nomination" power (*Public Citizen*), or the "presentment" power (*INS v. Chadha*, 462 U.S. 919 (1983)). Nor are they particularly significant powers. In *Youngstown Sheet & Tube Co.*, Justice Jackson discussed the different Executive powers enumerated in the Constitution, describing the powers included in Article II, Sections 2 and 3, including specifically the Opinion Clause, as "trifling." 343 U.S. at 641 n.9.

The Opinion Clause cannot be considered "exclusive" because it has long been recognized that Congress possesses wide-ranging investigative power. *See, e.g.*, *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). Without question, Congress' investigative power includes the power to receive information from the Executive Branch. More importantly, the Opinion Clause is not even implicated by FACA because

the statute creates an exception for advisory committees that are composed "wholly of full-time, or permanent part-time, officers or employees of the Federal Government." 5 U.S.C. App. 3(2)(C). If anything, FACA respects the Opinion Clause by including this exception. FACA regulates only the President's solicitation and use of the opinions of private, non-governmental parties participating in advisory committees. This "power" is not enumerated anywhere in the text of the Constitution, and, consequently, would fail even Petitioners' "bright-line" test.

The Recommendations Clause is not even an "executive" power; it is a legislative power, or, at most, a hybrid power that the President shares with Congress. Under the Constitution, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. Const. art. I, § 1. Congress can and does recommend its own legislation. In fact, only a member of Congress can introduce a bill for consideration by Congress. Charles W. Johnson, Parliamentarian of the U.S. House of Representatives, *How Our Laws are Made*, § 7 (2001), at http://thomas.loc.gov ("there is no constitutional or statutory requirement that a bill be introduced to effectuate the recommendations [of the President]"). The President must rely on a member of Congress to introduce any legislation he or she recommends for consideration. *Id.* As with the Opinion Clause, the Recommendations Clause would fail even Petitioners' "bright-line" test.

In addition, it simply cannot be said that FACA prevents the President from accomplishing any constitutionally assigned functions. Nothing in FACA prevents the President

from conferring with his or her principal officers and advisers to decide what, if any, proposals to submit to Congress. The President also remains completely free to solicit opinions from his principal officers and advisers, as well as private, non-governmental parties, on any subject matter, including proposed legislative schemes to recommend to Congress. The President certainly retains the choice not to solicit advice from advisory committees; he can do so through less formal mechanisms. *See, e.g., Nader v. Baroody*, 396 F. Supp. 1231, 1233 (D.D.C. 1975) (FACA does not apply to *ad hoc* meetings of advisers).

Any purported intrusion by FACA on Presidential power is, at most, *de minimis*. Again, the President retains a wide range of choices on how to obtain advice and formulate recommendations to submit to Congress, and well-recognized legal doctrines, such as executive privilege, remain available to protect the President's interests. If, in *Morrison*, the independent counsel law did not create an unconstitutional interference with the Executive Branch's core function under Article III, Section 3 to "take care that the laws be faithfully executed," then certainly FACA cannot be found to interfere impermissibly with the Executive Branch's power to make recommendations to Congress. *Morrison* conclusively demonstrates FACA's constitutionality.[8]

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[8] The Court in *Morrison* found it important that Congress had not sought to increase its own powers at the expense of the Executive Branch in enacting the independent counsel law. *Morrison*, 487 U.S. at 694. FACA, like the independent counsel statute in *Morrison*, "simply does not pose a danger of congressional usurpation of Executive Branch functions." *Id.* (quotations omitted).

Moreover, FACA serves both a significant Congressional interest and a significant public interest by restoring confidence in the integrity of governmental decision-making. FACA's most compelling purpose -- to reveal the hidden influence of special interests on advisory committees -- has important effects throughout the body politic.[9] *Public Citizen*, 491 U.S. at 453; *Minneapolis Star & Tribune Co. v. Minnesota Commn'r of Revenue*, 460 U.S. 575, 585 (1983) (an informed public is the essence of a working democracy). FACA recognizes and codifies the important public interest in knowing whether private, non-governmental parties are participating on federal advisory committees, because, unlike federal officials, private individuals are not accountable under our political system. That is why Congress provided, first and foremost, that "advisory committee meetings shall be open to the public." 5 U.S.C. App. 10(a)(1). These important objectives of FACA must weigh heavily in favor of the statute's constitutionality.

While Petitioners look to the minority position in Justice Kennedy's concurrence in *Public Citizen* for support, that opinion is unavailing. Pet. Br. 36-37. Unlike the ABA committee in *Public Citizen*, the NEPDG unquestionably falls within FACA's reach. More importantly, unlike this case, *Public Citizen* implicated an exclusive, core power of the President -- the power to nominate federal judges. As Petitioners cite, Justice Kennedy's concurrence in *Public Citizen* stated that "[w]here a power has been committed to a particular Branch of the Government in the text of the

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[9] In contrast, Petitioners cavalierly dismiss the important public purposes underlying FACA, stating that Respondents here have no "meaningful need for the information that they seek." Pet. Br. 35.

Constitution, the balance already has been struck by the Constitution itself." 491 U.S. at 486. As discussed above, the Recommendations and Opinion Clauses are far from exclusive powers committed to any *particular* branch. They much more resemble "trifling" powers, as Justice Jackson described them, or shared powers. Even if Justice Kennedy's concurrence were a majority opinion, it would not be controlling here.

Finally, as in *Nixon II*, the significant history of statutory regulation of Executive Branch materials -- which is exactly what is at issue in the case *sub judice* because the remedy available to Respondents is disclosure of the NEPDG's records -- further demonstrates that such regulation has never been considered unduly invasive of Presidential powers but, instead, promotes important informational goals. *Nixon II*, 433 U.S. at 445. This case pleads for a similar result.

CONCLUSION

For the foregoing reasons, Respondent Judicial Watch, Inc., respectfully requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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